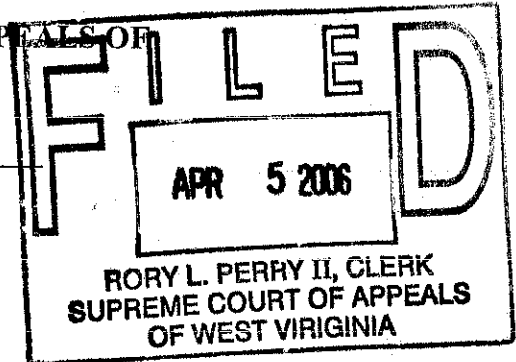


**IN THE SUPREME COURT OF APPEALS OF
WEST VIRGINIA**

**APPELLANT'S BRIEF
No. 33038**



**SUSAN M. JACKSON, Administratrix
of the Estate of Timothy J. Jackson,**

Appellant/Plaintiff

vs.

THE PUTNAM COUNTY BOARD OF EDUCATION

Appellee/Defendant

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TABLE OF CONTENTS

INTRODUCTION PROCEEDING AND NATURE OF RULING BELOW	2
STATEMENT OF THE FACTS	2
ASSIGNMENT OF ERROR	6
STANDARD OF REVIEW	8
LAW	9
I. THE PUTNAM COUNTY BOARD OF EDUCATION OWED A LEGAL DUTY TO THE PLAINTIFF TO PROVIDE BUS TRANSPORTATION TO THE SHOW CHOIR RETREAT THROUGH ITS ENACTMENT OF TRANSPORTATION RULES AND REGULATIONS ENCOMPASSED WITHIN THE BOARD POLICY MANUAL	9
A. THE BOARD OF EDUCATION OWED A LEGAL DUTY TO PROVIDE TRANSPORTATION TO TIMOTHY JACKSON	12
B. THE RETREAT WAS BOTH A CURRICULAR AND EXTRACURRICULAR EVENT	21
II. THE ISSUANCE OF A WRIT OF MANDAMUS WOULD BE AN INADEQUATE REMEDY AT LAW TO THE PLAINTIFF IN THIS CASE	23
III. THE PUTNAM COUNTY BOARD OF EDUCATION IS NOT RELIEVED FROM LIABILITY BY THE ACTS OF BRIAN RAMSBURG AND LARRY JACKSON BECAUSE THEIR ACTIONS WERE REASONABLY FORESEEABLE BY THE DEFENDANT AT THE TIME OF ITS ORIGINAL NEGLIGENT CONDUCT; THE DEFENDANT'S NEGLIGENT FAILURE TO PROVIDE TRANSPORTATION TO TIMOTHY JACKSON WAS A SUBSTANTIAL FACTOR IN BRINGING ABOUT HIS DEATH	25
A. FORESEEABILITY	25
B. CAUSATION	28

IV.	THE "HEALTH AND INSURANCE INFORMATION" FORM IS NOT A VALID EXPRESS AGREEMENT TO ASSUME THE RISK BECAUSE THE AGREEMENT, WHICH WAS PREPARED BY THE DEFENDANT, WAS DRAFTED IN A CONFUSING MANNER, WAS NOT UNDERSTOOD BY THE PLAINTIFF, AND THE TERMS OF THE FORM WERE NEVER INTENDED BY BOTH PARTIES TO APPLY TO THE DEFENDANT'S PARTICULAR CONDUCT WHICH CAUSED THE HARM IN THIS CASE	33
CONCLUSION		38
RELIEF REQUESTED		42
CERTIFICATE OF SERVICE		43

TABLE OF AUTHORITIES

Case Law	<u>Page</u>
<i>Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York</i> , 148 W.Va. 160, 133 S.E.2d 770 (1963)	9
<i>Cox v. Board of Education of Hampshire County</i> , 335 S.E.2d 365, 177 W.Va 576 (1987)	10
<i>Deputy v. Kimmell</i> , 73 W.Va. 595, 80 S.E. 2d 919, 923 (1914)	26
<i>Fayette County National Bank v. Lilly</i> , 199 W.Va. 349, 484 S.E.2d 232 (1997); Syl. Pt 3	8
<i>Harbaugh v. Coffinbarger</i> , 209 W.Va. 60, 543 S.E. 2d 341, 345 (2000)	29
<i>Hickman v. Epstein</i> , 192 W.Va. 42, 450 S.E.2d 406 (1994)	23
<i>Hively v. Merrifield</i> , 212 W.Va. 804, 575 S.E.2d 414 (2002); Syl. Pt. 3	8
<i>Jividen v. Law</i> , 194 W.Va. 705, 461 S.E.2d 451 (1995)	9
<i>Koffler v. City of Huntington</i> , 196 W.Va. 202, 469 S.E.2d 645 (1996); Syl. Pt. 1	8
<i>Kucera v. City of Wheeling</i> , 153 W.Va. 538, 170 S.E.2d 367 (1969); Syl. Pt. 2	24
<i>Miller v. Whitworth</i> , 193 W.Va. 262, 455 S.E.2d 821 (1995)	8
<i>Moore v. Wood County Board of Education</i> , 200 W.Va. 252, 489 S.E. 2d 1, 6 (1997)	26
<i>Murphy v. North American River Runners, Inc.</i> , 186 W.Va. 310, 412 S.E.2d 504 (1991)	34
<i>Painter v. Peavy</i> , 192 W.Va. 189, 451 S.E.2d 755 (1994)	8
<i>Peak v. Patliff</i> , 185 W.Va. 548, 408 S.E. 2d 300, 300 (1991)	30
<i>Perry v. Melton</i> , 171 W.Va. 60, 543 S.E.2d 8 (1982)	29
<i>Ratlief v. Yokum</i> , 167 W.Va. 779, 280 S.E.2d 584, 585 (1981)	26

<i>Redden v. Comer</i> , 200 W.Va. 209, 211, 488 S.E.2d 484, 486 (1997); Syl. Pt. 1	8
<i>State ex rel. Cooper v. Board of Education of Summers County</i> , 197 W.Va. 668, 478 S.E.2d 341 (1996), Syl. Pt. 1	10
<i>Wehner v. Weinstein</i> , 191 W.Va. 153, 444 S.E. 2d 31, 32	26
 Statutes and Regulations	
<i>Restatement (Second) Torts §496B</i>	34
<i>W.Va. Code §18-5-13(6)(a)</i>	9
<i>W.Va. Code § 55-7-6</i>	21
 Exhibits	
<i>Statement of Choir Director, Jeffery Haught, March 5, 2003 (Exhibit 1)</i>	2
<i>Deposition of Jeffery Haught (Exhibit 2)</i>	2
<i>Deposition of Brian Ramsburg (Exhibit 3)</i>	3
<i>Plaintiff's Complaint (Exhibit 4)</i>	4
<i>Defendant's Motion for Summary Judgment (Exhibit 5)</i>	4
<i>Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment (Exhibit 6)</i>	5
<i>Putnam County Board of Education Policy Manual (Exhibit 7)</i>	4
<i>Order Granting Defendant, Putnam County Board of Education's Motion fo Summary Judgment (Exhibit 8)</i>	6
<i>GA Handbook (Exhibit 9)</i>	4
<i>GA Retreat '01 Info (Exhibit 10)</i>	22

INTRODUCTION
PROCEEDING AND NATURE OF RULING BELOW

This is an appeal of a civil action brought by Appellant/Plaintiff, Susan M. Jackson, from an order of the Circuit Court of Putnam County dated June 28, 2005, entitled "*Order Granting Defendant, Putnam County Board of Education's Motion for Summary Judgment.*" The Court denied all of the grounds assigned by the Appellant in their Response to the Appellee's "*Motion for Summary Judgment.*" It is to the Trial Court's Order that this appeal is made to this Honorable Court.

STATEMENT OF THE FACTS

The Appellant, Susan M. Jackson, Administratrix of the Estate of Timothy J. Jackson, brought an action for the wrongful death of her son, Timothy Jackson, against the Appellee, Putnam County Board of Education (hereafter "The Board"), on June 11, 2003, in the Circuit Court of Putnam County, West Virginia.

Susan Jackson's son, Timothy, was a student at Winfield High School (hereafter "WHS"), and was a participant in a class known as "General Admission Show Choir" (hereafter Show Choir). *See Statement Jeffrey A. Haught* (March 5, 2003), Exhibit 1. On September 28, 2001, Timothy attended a **mandatory**, bi-annual Show Choir retreat held at a location known as, "Rippling Waters," a campground just north of Sissonville, West Virginia, in Kanawha County, approximately forty miles from WHS. *Id.* at 2. The 2001 retreat lasted from Friday evening, September 28th through Sunday, September 30th. *Id.* at 2-4. Approximately "forty" (40) students attended the retreat at Rippling Waters. *Depo. Jeffrey A. Haught, 14:5*, Exhibit 2.

Show Choir was both curricular and extracurricular, in terms of its scholastic design. *Id.* at

12:9-14 and 13:4-5. Both components of the course were taught by instructor, Jeffrey A. Haught, Choir Director, at WHS in Winfield, West Virginia. *Statement Jeffrey Haught p. 1.* Membership in the WHS Show Choir consisted of enrollment in the Show Choir class, which met everyday as part of the standard curriculum taught at WHS, or it could be taken as an extracurricular volunteer credit (without credit). *Id.* Timothy Jackson took this course for credit. The purpose of the course was to teach music, dance and choreography for the purpose of performing "many times" throughout the year at events which included WHS Homecoming, Christmas and Holiday performances, WHS graduation and baccalaureate, and at various other community venues. *Id.* As part of the Show Choir performance schedule, there was also an "extensive competition season," which ran from January through April. *Id.*

In addition to the aforementioned performances, after-school rehearsals were frequent. *Id.* During the 2001 school year, regular rehearsals were scheduled from 3:45 p.m. to 5:30 p.m. every Thursday, as well as "numerous" Saturday rehearsals and "three scheduled day-long or weekend retreats for intensive study." *Id.* Attendance at performances, rehearsals and retreats was mandatory for all choir members, including Timothy Jackson. *Id.*

The Show Choir Retreat at Rippling Waters ended on Sunday, September 30, 2001, at 4:00 p.m. *Id.* at 3. Students either departed in their own cars, or were greeted by their parents and driven home. *Id.* at 4. Timothy Jackson, who arrived at the retreat as a passenger in the car of fellow student, Brian Ramsburg, also left the Rippling Waters retreat with Mr. Ramsburg. *Id.* Tragically, during the trip back to their Putnam County homes, Brian Ramsburg lost control of his vehicle, causing it to roll over. *Depo. Brian Ramsburg 6 Exhibit 3.* The accident resulted in the death of Timothy Jackson.

In the lawsuit, which followed this incident, Susan Jackson alleges in part, that the Board negligently, by and through its agents WHS and Show Choir, failed to follow the rules and regulations of the Board regarding the transportation of students on student trips. *See Pl's Compl* June 11, 2003, Exhibit 4. Specifically, the Appellant alleges in the Complaint that WHS failed to follow *West Virginia Code*, § 18-5-13(6)(a) [now *West Virginia Code* §18-5-13(f)(1)] , the *Policy Manual, Rules and Regulations of the Board of Education of Putnam County* (Pertinent sections, Exhibit 7, hereinafter referred to as the "Board Policy Manual"), and the *Handbook of Policies and Procedures for General Admission, 2001-2002, First Edition* (Exhibit 9, hereinafter referred to as "GA Handbook"), which describe specific laws, regulations, and guidelines regarding student transportation to and from curricular and extra-curricular school sponsored events. *Id* at 2. Ms. Jackson alleges that no means of transportation was offered to students attending the mandatory Show Choir retreat. *Id*.

Further, it is alleged that WHS failed to ensure that all Board policies and procedures were implemented and followed without exception. *Id*. Ms. Jackson alleges that in breaching its duty to provide safe transportation, and by failing to implement and properly supervise transportation policies related to curricular, co-curricular, and/or extra-curricular activities, such breaches proximately caused the fatal injuries suffered by Timothy Jackson. It is the position of the Appellant that the Estate of Timothy Jackson should be entitled to recover compensatory damages flowing from the Appellee/Defendant's negligence.

Procedurally, the Appellee below filed a Motion for Summary Judgement and Supporting Memorandum on August 9, 2004. *See Def's Mot. S. J.*, Aug. 9, 2004. Exhibit 5. In that motion, the Appellee argued that the Appellant could not establish the existence of a genuine issue of

material fact because the Board was “under no duty” to provide transportation to students participating in the Show Choir’s Annual retreat. *Id.* at 5. Further, the Appellee argued that the Show Choir retreat should be characterized as a “curricular” event, rather than an extracurricular event. *Id.* at 8. The Appellee made such distinction in order to argue that the Show Choir retreat which was held out-of-county and overnight, was merely “additional classroom instruction” and that as such, the students were permitted under the Board Policy Manual to provide their own transportation to and from the “classroom.” *Id.*

On August 24, 2004, the Appellant filed its *Memorandum in Opposition to Defendant’s Motion for Summary Judgement*. See *Pl’s Memorandum Defs’ Mot S.J.*, Aug. 24, 2004. Exhibit

6. In its response, the Appellant argued the following:

- (1) The Board was under a duty to provide transportation to and from the Show Choir retreat.
- (2) The Show Choir retreat was a “student trip” that qualified as both a curricular and extracurricular student activity.
- (3) *West Virginia Code*, §18-5-13(6)(a) empowers a local school board to establish its own regulations regarding the transportation of school children to and from board approved curricular and extracurricular activities.
- (4) The *Board Policy Manual* established such rules and regulations regarding the transportation of students to curricular and extracurricular events, but failed to follow them. The Appellant alleged that the following Putnam County Board of Education policies were breached by WHS:
 - (a) WHS failed to use a school or charter bus for the Show Choir retreat, although Board policy mandated that any trip in which ten (10) or more students are involved shall utilize such specified transportation.
 - (b) WHS failed to seek Board approval for a trip which crossed the Putnam County line.

- (c) WHS failed to seek Board and Superintendent approval for an overnight trip to Rippling Waters campground.
- (d) WHS allowed students to drive during a school sponsored trip, although a policy which prohibited such student transportation was in place.

(See Pl's Memorandum Def's Mot S.J.)

On November 22, 2004, a hearing was held regarding the Putnam County Board of Education's *Motion for Summary Judgement*. See *Or. Granting Defs' Mot S.J.* June 28, 2005, Exhibit 8.) After reviewing the *Motion for Summary Judgement*, the supporting memoranda of law, the Appellant/Plaintiff's response thereto, and the Appellee/Defendant's reply brief, along with oral arguments of the parties, the Honorable N. Edward Eagloski II, granted the Board's Motion and delivered a twenty-four point Memorandum entitled, "*Findings of Fact and Conclusions of Law*," to support his decision. *Id.* at 1-6. The Court's specific findings of fact will be utilized to articulate the Appellant/Plaintiff's assignment of error in this case.

ASSIGNMENT OF ERROR

1. The Circuit Court erred in holding that the Board owed no legal duty to the Appellant to provide bus transportation to her deceased son, Timothy Jackson, while he was attending the mandatory Show Choir Retreat. *Id.* at 3.
2. The Circuit Court failed to recognize that *West Virginia Code*, §18-5-13(6)(a), empowers local school boards to establish its own regulations which provide for "adequate means of transportation for school children participating in board approved curricular and extracurricular activities." While the Court properly found that the West Virginia Code section does not, in and of itself, create a mandatory legal duty on behalf of the local

school Board to provide transportation to students for Board-approved curricular and extracurricular activities, the Court did not recognize that *West Virginia Code* §18-5-13(6)(a), provides a school Board with the ability to create its own rules and regulations governing transportation for students to and from such events. *Id.*

3. The Circuit Court found it legally and factually insignificant that the Board did in fact establish and implement its own regulations regarding student transportation to curricular and extracurricular events through its *Rules and Regulations of the Board of Education of the County of Putnam*, July 25, 1995 (with all changes through May 20, 2002), and that such rules and regulations created a legal duty on behalf of WHS to abide by the rules set forth by the Board. *Id.* at 1-6.
4. The Circuit Court erred by holding that even if the Board had an obligation to provide transportation for the students to and from the retreat, it would be an obligation which could only be enforced by way of a writ of mandamus as a violation of civil rights and not as a cause of action in tort. *Id.* at 3-4.
5. The Circuit Court erred by holding that even if the Board had a legal duty to transport Timothy Jackson to and from the retreat, Timothy's father, Larry Jackson, was negligent by allowing Timothy to ride with a fellow student to and from the retreat. The Circuit Court erred by holding that such act by Larry Jackson was a superseding/intervening act which breaks any chain of causation between the Board's purported failure to provide transportation for the deceased and the death of Timothy Jackson. *Id.* at 4-5.
6. The Circuit Court erred by holding that a *Health and Insurance Information* form signed by Larry Jackson, Timothy's father, prior to Timothy's departure to the retreat, was a

valid release of any and all negligence claims against the Board and WHS. *Id.* at 4-5.

7. The Circuit Court erred by holding that driver and student, Brian Ramsburg's negligent operation of his vehicle is a subsequent superseding/intervening act which also broke the chain of causation, not only with Larry Jackson's negligence, but also to that of the Board (if it were to be determined that a legal duty was imposed by statute or by the Board's own rules and regulations). *Id.* at 5.

STANDARD OF REVIEW

This Court has held that upon appeal, the entry of summary judgment is reviewed by this Court *de novo*. *Redden v. Comer*, 200 W.Va. 209, 211, 488 S.E.2d 484, 486 (1997); Syl. Pt. 1, *Koffler v. City of Huntington*, 196 W.Va. 202, 469 S.E.2d 645, 648 (1996); *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755, 758 (1994). Although the Court's standard of review for summary judgment remains *de novo*, a circuit court's order granting summary judgment must set out factual findings sufficient to permit meaningful appellate review. Syl. Pt. 3 *Fayette County National Bank v. Lilly*, 199 W.Va. 349, 484 S.E.2d 232, 233 (1997). Findings of fact, include those facts which the circuit court finds relevant and determinative of the issues. *Hively v. Merrifield*, 212 W.Va. 804, 575 S.E.2d 414, 414 (2002).

In the case at hand, there are two (2) separate summary judgment standards which must be applied to the questions presented by this case.

The Appellant asks that a determination be made as to whether the Board had a legal duty to provide transportation to Timothy Jackson on the weekend of September 28th, 2001. Whether this duty exists will be determined by this Court rather than by a jury. This Court has determined that whether a duty exists is a question of law, and not a question of fact for the jury. *Miller v.*

Whitworth, 193 W.Va. 262, 455 S.E2d 821 (1995).

However, regarding all other issues pertaining to this appeal, the standard for summary judgment shall be that a Court must determine whether it is clear that there is no genuine issue of fact to be tried, and whether inquiry concerning the facts is desirable to clarify the application of the law. Syl Pt. 3, *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770, 771 (1963). A "genuine issue" is simply one half of a trialworthy issue, and a genuine issue does not arise unless there is sufficient evidence favoring the non-moving party for a reasonable jury to return a verdict for that party. The opposing half of a trialworthy issue is present where the non-moving party can point to one or more disputed "material" facts. A material fact is one that has the capacity to sway the outcome of the litigation under the applicable law. Syl. Pt. 5, *Jividen v. Law*, 194 W.Va. 705, 461 S.E.2d 451, 454 (1995). A Circuit Court "must draw any permissible inference from the underlying facts in the light most favorable to the party opposing the motion." *Painter* 451 S.E2d at 758.

LAW

I. THE PUTNAM COUNTY BOARD OF EDUCATION OWED A LEGAL DUTY TO THE PLAINTIFF TO PROVIDE BUS TRANSPORTATION TO THE SHOW CHOIR RETREAT THROUGH ITS ENACTMENT OF TRANSPORTATION RULES AND REGULATIONS ENCOMPASSED WITHIN THE BOARD POLICY MANUAL

The *West Virginia Code*, §18-5-13(6)(a) [now WV Code §18-5-13(f)(1)], empowers a local school board to establish its own regulations regarding the transportation of school children to and from board approved curricular and extracurricular activities. *W.Va. Code*, §18-5-13(6)(a) (2005). Specifically, the West Virginia Code provides, in part:

The boards, subject to the provisions of this chapter and the rules of the state

board, have authority.....to provide at public expense adequate means of transportation, including transportation across county lines for all children of school age who live more than two (2) miles distance from school by the nearest available road....; to provide at public expense and according to such rules as the board may establish, adequate means of transportation for school children participating in board-approved curricular and extracurricular activities...

W.Va. Code., §18-5-13-6(a); Board Policy Manual, Subsection "T": Transportation and Other Support Services," §T.3.1, p. 262, (July 25, 1995, with all changes through May 20, 2002).

The West Virginia Legislature has given local boards of education the discretion to decide whether it will provide school bus transportation to school children and to implement rules and regulations governing such transportation system. *W.Va. Code., §18-5-13(6)(a); State ex rel. Cooper v. Board of Educ. Of Summers County*, 197 W.Va. 668, 478 S.E.2d 341, (1996). Once local school boards enact more specific transportation regulations, they then have the responsibility to manage any system established for the transportation of school children. *W.Va. CodeAnn, §18-5-13(6); Cox v. Board of Educ. Of Hampshire County*, 177 W.Va. 576, 355 S.E.2d 365, 370 (1987).

The *Board Policy Manual* which was effective at the time of Timothy Jackson's death, expanded upon the authority given to it by the legislature when it mandated the following in regard to transportation services to students:

....service is provided and shall be provided by the Putnam County Board of Education according to the policies, rules, and regulations established by the West Virginia Board of Education and those enumerated in the following sections...

Board Policy Manual, § T.3.1, p. 262-263.

Within the *Board Policy Manual*, the Board sets forth definitions and regulations regarding student curricular, extracurricular and recreational trips. *Board Policy Manual, § T.3.4*

p. 264. Specifically, the *Board Policy Manual* defines "student trips" in the following way:

Student trips include but are not limited to extracurricular trips, curricular trips and recreational trips. Extracurricular trips are those associated with extracurricular activities such as athletics, bands, clubs, and so forth. Curricular trips are those which supplement and extend classroom instruction. Such trips must be closely tied to cognitive instructional learning outcomes and should provide students with experiences and opportunities that are an extension of topics being studied in the classroom.

Recreational trips are those to recreational parks or areas not associated with extracurricular or curricular school activities. Recreational trips include but are not limited to amusement parks, senior trips, ski trips, and so on...

Board Policy Manual, § T.3.4, p. 264-265.

Regardless of the type of trip taken, all trips involving ten (10) students or more must be made on school buses or charter buses. *Board Policy Manual*, § T.3.4, p. 265. When trips are taken which do not involve the transportation of ten (10) or more students, the principal is given the authority to determine the mode of transportation that will be taken. *Id.*; *W.Va. Code*, §18-5-

13. And, out of an abundance of caution for the safety of traveling students, it is mandated that:

Under no circumstances may a student or anyone under twenty-one (21) years old be allowed to serve as a driver for a student trip unless they are a regular or substitute bus operator employed by the Board of Education. All drivers, other than regular or substitute operators, must have approval of the trip sponsors and the school principal.

Board Policy Manual, § T.3.4, p. 264-265.

During extracurricular trips, students are not permitted to drive their own automobiles; nor are they be permitted to drive an automobile owned by another person, such as a Board employee, to transport themselves and others to an athletic event or any other extracurricular event. [emphasis added] *Board Policy Manual*, Subsection: "Transportation in private vehicles," § T.3.9, p. 272.

On a regulatory and system management level, the *Board Policy Manual* mandates that all student trips must have the approval of the school principal and that requests must be submitted to the principal at least three (3) weeks prior to the trip. *Board Policy Manual*, § T.3.4, p. 265. Additional approval is necessary in the following circumstances:

<u>Type of Trip</u>	<u>Destination</u>	<u>Additional Approval Needed</u>
overnight	all	Superintendent and Board
non-school day	in state	Superintendent

("Non-school day trips" are defined as those trips made on days when school is not in session.)

Board Policy Manual, T.3.4, p. 265.

And, finally, "special regulations" for curricular and extracurricular activities of the Board require that a "request for special trips be made in writing by the principal or assistant principal on prescribed forms in triplicate at least ten (10) days in advance of each trip." *Board Policy Manual*, § T.3.8, p. 270. In all cases, students are required to complete permission slips that are signed by their parents or guardians and then returned to the teacher or sponsor before the student is allowed to make the trip. *Board Policy Manual*, § T.3.4, p.264.

A. The Board of Education Owed a Legal Duty To Provide Transportation to Timothy Jackson

The Board had a legal duty to provide transportation to the Show Choir retreat for Timothy J. Jackson on September 28, 2001. As discussed above, the *W.Va. Code*, § 18-5-13(6)(a), clearly authorized the Board to enact its own rules and regulations regarding, in pertinent part, (1) adequate means of transportation, at public expense, for school children participating in board-approved curricular and extracurricular activities; and (2) to provide at

public expense adequate means of transportation for all school children across county lines who lived more than two (2) miles from school. *W.Va. Code*. §18-5-13(6)(a).

With this statutory empowerment as its guidepost, the Board has the authority to enact rules and regulations that its member schools must follow. In the case at hand, the Board did, in fact, enact very specific rules and regulations which provided for the transportation of school children across county borders for curricular and extracurricular activities in Putnam County. (See *Board Policy Manual*, § T.3.1, T.3.4, T.3.8, T.3.9). From even a casual reading of the *Board Policy Manual*, one is able to discern that the Board is a governing body of a political subdivision that is charged with policymaking and is primarily responsible for the establishment of programs and procedures for the safe and efficient operation of public schools within its county. *Board Policy Manual, Subsection "B", Board Governance and Operation*, § B.8.1.p.26-27.

Importantly, all employees are expected to know and follow the law, West Virginia Board of Education Policy, and Putnam County Board of Education Policy. *Id.* The Board is so adamant that its employees be familiar with its policies, that it specifically directs its employees and others to "review and study it." *Id.* The *Board Policy Manual* was given to each school and facility in Putnam County and was incorporated into each teacher and student handbook. *Board Policy Manual, Subsection: "Aims and Objectives"*, p. 9. The *Board Policy Manual* is even utilized by Human Rights Officers to train students and faculty. *Board Policy Manual, Subsection: "Aims and Objectives"*, p. 9.

There is no doubt that the Board expected to bind its administrators, teachers, Board members and agents to the regulations set forth within the manual. And, as a corollary, parents

and students within Putnam County should have expected that the Board, its members and its agents would follow the rules and regulations that they, themselves, drafted and implemented, for the protection of students. In essence, the *Board Policy Manual* provides, amongst other things, a written 'standard of care' for the transportation of school-age children that teachers, school administrators, and Board members were expected to follow when arranging, implementing and supervising transportation for curricular, extracurricular, or special events. *See Generally, Board Policy Manual, Transportation Subsections.*

In regard to transportation, the 'standard of care,' as written in the policy manual, made it **mandatory** that "*all trips involving ten (10) students or more must be made on school buses or charter buses.*" *Board Policy Manual*, §T.3.4, p. 265. Choir Director, Jeffrey Haught, testified in his deposition that approximately "forty" (40) students were involved in the Show Choir retreat. *Depo. Haught 14:5* In the case at hand, neither school buses nor charter buses were provided for students traveling to and from the Show Choir Retreat, which is a direct violation of the Board's transportation policy. *Statement Jeffrey Haught.*

This violation of the Board's policy is not surprising considering that Mr. Haught admitted under oath that he **did not** read, although it was provided to him, the *Board Policy Manual*, which contained regulations regarding the transportation of students to curricular and extracurricular activities. *Depo. Haught, 22: 4-5.* Mr. Haught's lack of knowledge and understanding concerning the *Board Policy Manual* was illustrated in the following question and answer exchange during his deposition:

Q I've got a document called "Policy Manual: Rules and Regulations of the County of Putnam, Winfield, West Virginia, July 25th, 1995 (with all changes through May 20th, 2002)." One of the rules, C2-4 states, that the

superintendent shall prepare and issue such administrative manuals or booklets of instruction as may be deemed necessary for the effective administration of the schools. These shall be distributed to the employees directly concerned. Did you ever receive any type of booklet or manual from the school board regarding policy that you had to read?

A We receive a teacher's handbook every year.

Q Ok

A There are many, many documents in it, and many, many copies I'm sure. Did I read it? No.

Q Ok

A It's on a filing cabinet in my office.

Q Would you have the one for the 2001/2002 school year?

A Probably, but I couldn't be sure of that.

Depo. Haught, 21:14 -22:10.

Although Mr. Haught was quite candid about his failure to read the *Board Policy Manual*, his lack of regard for having failed to do so is nothing short of astonishing.

Mr. Haught continued to admit his lack of knowledge or understanding regarding the Board's transportation regulations through his admission that he had prepared his own *GA Handbook*, which, in part, outlined travel policies for the Show Choir group, most of which, were counter to those mandated by the *Board Policy Manual* that governed the Show Choir retreat. *Statement Jeffrey Haught, p.2, and GA Handbook, p. 25.* According to Haught, the "*GA Handbook*" that he designed totally disregarded the *Board Policy Manual* requirements that trips involving ten (10) or more students be taken by school bus or charter bus. Specifically, in a type-written statement prepared by Haught, he offered the following on Show Choir Bus travel policy:

As explained in the Handbook, whenever possible, the choir travels by bus, and every member rides the bus. There are, however, three exceptions: 1) when the distance is small enough to allow day trips; 2) when GA is performing in the immediate area; 3) when the cost of a bus is prohibitive. This policy predates my employment at Winfield, and is not inconsistent with many co-curricular or extra-curricular activities. While buses are preferable for travel, sometimes circumstances make it impossible.

To quote further from the Handbook:

Members will present to the Director IN WRITING PRIOR TO THE TRIP (sic) how they will arrive at the event, who will be driving and who will be riding with them. (This is done to insure that every member's travel arrangements are accounted for, and so that the Director and parents are aware of who their child is riding with.)

In these instances, General Admission's, and the Director's liability, is limited to the period from the member's arrival at the event site until dismissal from the event. All other liability for the child's safety lies with the parent, or their designated drivers.

Parents are STRONGLY (sic) discouraged from allowing students to drive to events unaccompanied by parents.

As stated above, members are to remain on site until dismissed from the event.

Again, the child's safety is of utmost importance, and parents should exercise their wisdom, good judgment and discretion when planning travel arrangements.

Statement Jeffrey Haught, p. 2.

Haught's statement admits that he followed the "GA Handbook," rather than the *Board Policy Manual* regarding student transportation. *Id.* A bus was not offered, nor provided to the students on the date in question despite the fact that the trip occurred across county lines, overnight, and involved more than ten (10) students. According to Haught's statement, one can deduce that a bus wasn't provided for the Show Choir retreat because either he didn't believe the trip was long enough, or because he felt that Rippling Waters campground in Sissonville, West

Virginia, was in the "immediate area" of Winfield, West Virginia, or because the bus was cost prohibitive.

The *Board Policy Manual* defines "longer trips" as those which involve crossing county or state lines. *Board Policy Manual*, § T.3.8 p. 270. Longer trips require the approval of the principal, who shall, in turn, submit a written request to the superintendent not less than two (2) weeks prior to the proposed trip. *Id.* All "longer trips" made by school groups which involve crossing county or state lines are required to have the prior approval of the Superintendent of Schools, except in cases where the students are to perform at athletic events in which the school has a participating team, or annual, sectional, regional or state band festivals. *Id.* In such cases, the principal has the authority to grant or refuse permission. *Id.*

Rippling Waters campground is located approximately forty (40) miles from Winfield, WV. *Statement Jeffrey Haught*, p. 2. It is apparent, from the plain text of the *Board Policy Manual*, that the forty (40) mile trip to Rippling Waters, located outside the Putnam County line, is a "longer trip." And, given that the three (3) day trip, encompassing a weekend, was also an overnight trip, the *Board Policy Manual* clearly mandates that the principal, Superintendent of Schools and the Board approve such trips. *Board Policy Manual*, § T.3.4 and T.3.8.

None of these regulations are mentioned in Haught's *GA Handbook*, nor did he comply with them on the weekend of Timothy Jackson's death. In fact, Mr. Haught, in his deposition, admitted that he only sought schedule clearance for the suggested date of the retreat from his school principal, and such dates were approved, provided there were no scheduling conflicts. *Depo. Haught*, 9:1 - 10:4. When asked whether the Board or Superintendent of Schools was notified about the Show Choir events, he responded in the following way:

"Q Okay. Is there anything that you do as the director of the show choir that requires you to obtain approval from the board of education?"

A I am taking time with that because we have probably 80 different dates during the course of the year, and I am trying to see if any of those fall into that category.

Q I understand

A When we make major trips or major competitions I usually clear that with the scheduling in the office.

Q Okay. And is that the office at Winfield or the office at the board of education?

A Yes, at Winfield.

Q Winfield High School?

A Yes.

Q Okay. Do you know if anybody at the school when you -- when you notify them of certain events that are going to occur, do you know if any of them ever have to go above the Winfield High School Principal level to get approval?

A When we do -- when we requisition buses from the county, or when we have an event which would take us out of school time we have to fill out a form for approval of that, if we requisition buses. The form goes to my immediate supervisor, which is Mr. Huighes. From him it goes to, I think, the assistant superintendent, or perhaps directly to the superintendent for approval of the bus to be requisitioned or the time to be taken off from school time.

Q Does the board have to approve events that you attend out of state?

A I am not aware of that.

Q Do you know whether or not the board has to approve anything you do out of county?

A I am not aware of that either. In other words, it has not been the practice over the past years. I can't speak to the legality of whether it is or not, but

it has not been my practice to run my schedule through the board office.

Q Okay, do you have to receive approval from your principal to attend events out of state or out of county?

A I go to my principal with the date and tell him we are thinking about this, if there is a problem or a conflict he tells me at that time.

Q Okay, but you are pretty much, then, free to set up the schedule as far as where you do things and when you do things, as long as there is no conflict with other school events?

A That is correct.

Q So when you set up this retreat in 2001 September -- I think it was the 29th was the first day; is that correct?

A Yes.

Q You didn't have -- all you had to do was clear that date as far as no conflict with other school events?

A There were many conflicts with school events on that date.

Q Okay..... "

Depo Haught, 7:16 - 10:4.

Mr. Haught's deposition demonstrates that he did not seek to requisition buses for the Show Choir Students and nor did WHS seek prior approval of the trip from the Superintendent of Schools nor the Board. Further, if permission was sought through the WHS Principal, the Principal failed to inform Mr. Haught that buses were required for the trip. These acts and omissions clearly breach the duty of care, as outlined by the *Board Policy Manual*, that was owed to Timothy Jackson, during the Show Choir retreat. The Board's breach of its duty to provide bus transportation to Timothy Jackson to and from Rippling Waters Campground, proximately caused his death. If Mr. Jackson had been offered school bus or charter bus transportation to the

retreat event, he would not have died in a car wreck traveling home from the retreat in Brian Ramsburg's car.

In the Court below, the Appellee/Defendant attempted to end-run the *Board Policy Manual* requirements by merely pointing out that students were asked to provide to Mr. Haught a written note describing how they would arrive at the retreat event. *GA Handbook* p. 25, *Statement Jeffrey Haught*, p. 2. The Defendant's argument ignores the fact that the Board requires that both a permission slip to attend the event be signed and that the school must provide bus transportation to children during trips where more than ten (10) students will travel across county lines. *W.Va. Code*, §18-5-13, *Board Policy Manual*, § T.3.4 p. 264- 266.

Further, the permission slip requirement is designed for the sole purpose of parents granting consent for the child to attend the school-affiliated function away from school grounds. The permission slip is not intended to allow the student or the parent to waive his or her right to school sponsored bus transportation. The *Board Policy Manual* makes no provisions within its text for students or parents to choose the method of transportation that would be utilized for trips involving ten (10) or more students and across county lines or to waive his or her right to a method of transportation provided for by Board policy or state law. *W.Va. Code*, §18-5-13, *Board Policy Manual*, § T.3.4 p. 264- 266.

Any "permission slip" which would have authorized or permitted a student to drive their own automobile to an extracurricular trip is an express violation of the *Board Policy Manual*. *Board Policy Manual*, Subsection: "Transportation in private vehicles." § T.3.9, p. .272. In the case at hand, in a document entitled, *GA Retreat '01 Info*, Haught required only that students must indicate to him, "before Friday," whether they would arrive at Rippling Waters on Friday or

Saturday morning and with whom they would be traveling. See *GA Retreat '01 Info*, p. 1 Exhibit 10. The *GA Retreat '01 Info* document issued only a warning that parents were "HIGHLY discouraged" from allowing students to drive other students without parental accompaniment. *Id.* Instead of prohibiting the practice of students riding with students, Haught merely discouraged it and even granted permission for this mode of transportation if the parent approved. The Director's conduct is a blatant breach of the *Board Policy Manual* student transportation regulations. After all, Board Policy mandates that students are not permitted to drive their own automobiles to any extracurricular activity. *Board Policy Manual, Subsection: "Transportation in private vehicles."* § T.3.9, p. 272. This policy is mandatory despite Haught's attempted allowance of parental approval. If Haught had properly ordered appropriate bus transportation, as outlined in the *Board Policy Manual*, there would have been no need for parents or students to contemplate how they would be transported to or from the Show Choir retreat.

B. The Retreat Was Both a Curricular and Extracurricular Event

The Show Choir Retreat was both a curricular and extracurricular event. As noted above, an extracurricular trip is associated with activities such as athletics, bands, clubs, and so forth. *Board Policy Manual*, T.3.4, p. 264. While curricular trips are those which supplement and extend classroom instruction. *Id.* Curricular trips must be closely tied to cognitive instructional learning outcomes and should provide students with experiences and opportunities that are an extension of topics being studied in the classroom. *Id.*

Membership consists of enrollment in the Show Choir class at WHS, which meets every day, and/or extracurricular volunteerism can be accomplished by the student without credit.

Statement Jeffrey Haughy p. 1. The class is an elective course and students are accepted into the class by audition only. *Id.* The Show Choir performs many times during the year, including WHS Homecoming, Christmas and Holiday performances, WHS graduation and baccalaureate, and various community venues. *Id.* Its performance schedule also includes an extensive competition season, which runs from January through April. *Id.*

Additionally, performances and after-school rehearsals are frequent for the GA Show Choir. *Id.* During the 2001 school year, rehearsals were scheduled after school from 3:45 p.m. to 5:30 p.m. "practically every Thursday," as well as "numerous" Saturday rehearsals and three scheduled day-long or weekend retreats for intensive study. *Id.* Attendance at performances, rehearsals or retreats is mandatory for all show choir members. *Id.*

Under this curriculum set-up, the Show Choir retreat is both a curricular and non-curricular event. Analogous to stage band and other band affiliated classes that are offered throughout West Virginia's secondary schools, Show Choir participation requires more time spent outside the classroom in practice and rehearsal than inside the classroom instruction. Travel and performances must necessarily be considered extracurricular as neither of these components of participation can be said to be "closely tied to cognitive instructional outcomes." A curricular trip would be much more akin to a student "field trip" to a planetarium or cultural center. And, an extracurricular trip, by the Board's definition would involve performances by bands or athletic competition. The Show Choir was both a competitive group and a performing group. Therefore, participation in the weekend Show Choir retreat must be considered extracurricular in nature since it was a practice rehearsal for upcoming competitions.

In reality it does not matter whether it was an extracurricular or curricular activity.

Timothy Jackson was enrolled in the Show Choir class and attendance at the Rippling Waters retreat was **mandatory**. *Depo. Haught, 12:13-14; Statement Jeffrey Haught, p. 1.* Under Board Policy, student trips include both curricular and extracurricular trips. *Board Policy Manual, § T.3.4, p. 264.* The requirements regarding board approval of out of county and overnight trips are the same for both curricular and extracurricular trips. Most importantly, all student trips, both curricular and extracurricular, involving ten (10) or more students must be made on a school bus or charter bus. *Id.* Therefore, the classification of this trip as either extracurricular or curricular is of no consequence regarding the Board's duty or the school's duty to transport the students to Rippling Waters for the retreat. And, there is no escaping the fact that this trip included at least forty (40) students, thus, the Board had a duty to provide transportation to Timothy Jackson for this trip.

II. THE ISSUANCE OF A WRIT OF MANDAMUS WOULD BE AN INADEQUATE REMEDY AT LAW TO THE PLAINTIFF IN THIS CASE.

The issuance of a writ of mandamus would be an inadequate remedy at law to Susan Jackson for the wrongful death of her son, Timothy Jackson. The function of a writ of mandamus is to enforce the performance of official duties from the discharge of some public function, or imposed by statute. *Syl. Pt.1, State ex rel. Cooper, 478 S. E.2d at 341.*; See also *Syl. Pt. 2, Hickman v. Epstein, 192 W.Va. 42, 450 S.E.2d 406 (1994).* The general rule in West Virginia is that a writ of mandamus will not issue unless three elements coexist: (1) the existence of a clear right in the appellant to the relief sought; (2) the existence of a legal duty on the part of the appellee to do the thing which the appellant seeks to compel; and (3) **the absence of another adequate remedy** at law. *Id.* at 343. Further, a writ of mandamus shall not be

issued where unnecessary or where, if used, a writ would prove unavailing, fruitless, or nugatory. *Cox*, 355 S.E.2d at 369.

In the case at hand, there are certainly other adequate remedies at law. There are common law and statutory causes of action for negligence and wrongful death, respectively, that are available to the Appellant in this case. In fact, both negligence and wrongful death were plead by the Appellant in her complaint in this action. *Pl's Comp.* . Regarding Ms. Jackson's claims, the Putnam County Circuit Court held that even if the Board had an obligation to provide transportation for students to and from the retreat, that it would be an obligation which could only be enforced by way of writ of mandamus as a violation of civil rights and not as a cause of action in tort. *Or. Granting Defs' Mot. S.J. p. 3-4.* Under the *Cox* decision, the application of mandamus to this case would be absurd. It would be impossible to retrospectively enforce the Board's duty to provide transportation to Timothy Jackson after Timothy Jackson's death. Further, neither our Courts nor our legislature have mandated that a plaintiff is confined to injunctive mandamus relief in all cases involving school board negligence.

Perhaps, if Choir Director, Jeffrey Haught, had actually read the *Board Policy Manual*, and if he had been familiar with the Board's transportation safety regulations in any way, then he arguably might have had the presence of mind to request that such transportation be provided to the students. If he had made that request, and had been denied, then he or the parents of the Show Choir students could have sought a writ of mandamus to force the Board to perform an official duty that was imposed on it by its own regulations, before a student lost his life. However, we know from Haught's deposition testimony that he never read the Board Policy Manual, he never read the Board's transportation regulations, and never sought bus

transportation for the Show Choir students to the retreat at Rippling Waters. *See generally, Depo. Haught.* As a result of Haught's negligence, Timothy Jackson died without knowing that he had a right to be transported by the Board to the Show Choir retreat. The negligence of the Board and the resulting wrongful death of Timothy Jackson can adequately be pursued under the West Virginia Wrongful Death Statute which provides for monetary damages to prevailing plaintiffs. *W.Va. Code Ann. § 55-7-6* (2005).

Therefore, the Appellant respectfully requests that this Court find that the issuance of a writ of mandamus would prove to be inadequate, unavailing, fruitless and nugatory and that the adequate remedy at law and the proper measure of damages are those which are typically awarded in negligence claims and those which can be found in *W.Va. Code § 55-7-6*. The Appellant requests that this Court reverse the Circuit Court's holding on this matter and remand this case to that Court for further proceedings.

III. THE PUTNAM COUNTY BOARD OF EDUCATION IS NOT RELIEVED FROM LIABILITY BY THE ACTS OF BRIAN RAMSBURG AND LARRY JACKSON BECAUSE THEIR ACTIONS WERE REASONABLY FORESEEABLE BY THE DEFENDANT AT THE TIME OF ITS ORIGINAL NEGLIGENT CONDUCT; THE DEFENDANT'S NEGLIGENT FAILURE TO PROVIDE TRANSPORTATION TO TIMOTHY JACKSON WAS A SUBSTANTIAL FACTOR IN BRINGING ABOUT HIS DEATH.

A. Foreseeability

As previously discussed, the Board had a legal duty to transport Timothy Jackson to the mandatory Show Choir retreat at Rippling Waters Campground in Sissonville, West Virginia. The Board's negligent failure to perform that duty was a substantial factor in causing Timothy Jackson's death. The Board is not relieved from liability by the alleged intervening acts of Brian Ramsburg or Larry Jackson, because the Board should have reasonably foreseen that its failure to

provide transportation to the traveling Show Choir members for an out-of-county, overnight trip could have resulted in injury or death to traveling students.

The law surrounding proximate cause is well established by this Court. For negligence to be actionable, it must be the proximate cause of the injury complained of and the negligence must be such that it might have been reasonably expected to produce an injury. *Wehner v. Weinstein*, 191 W.Va. 153, 444 S.E.2d 31, 32 (1994). All questions of negligence, due care, proximate cause and concurrent negligence present issues of fact for jury determination when the evidence pertaining to such issues is conflicting or where the facts, even if they are undisputed, are such that reasonable men could draw different conclusions from those facts. Syl. Pt. 1, *Ratlief v. Yokum*, 167 W.Va. 779, 280 S.E.2d 584, 585 (1981).

Here, the Board should have reasonably expected that its failure to provide school children with bus transportation to a mandatory two-day Show Choir retreat held outside of Putnam County, could subject traveling children to unnecessary risk of injury or death during their travels to and from the event. The expectation that children will do foolish things and take unnecessary risks was perfectly documented by this Court in the following admonition:

“[c]hildren, wherever they go, must be expected to act upon childish instincts and impulses; and others who are chargeable with a duty of care and caution toward them, must calculate upon this, and take precaution accordingly.”

Moore v. Wood County Board of Education, 200 W.Va. 252, 489 S.E.2d 1, 6, quoting *Deputy v. Kimmell*, 73 W.Va 595, 603-04, 80 S.E. 919, 923 (1914).

There is no doubt that the Board foresaw tremendous risk in school children transporting themselves to school events as it enacted specific transportation policies which required that trips involving more than ten (10) school children should be made on school buses or charter buses.

Board Policy Manual, § T.3.4, p. 265. By drafting a transportation safety rule such as this, the Board acknowledged that it is dangerous for multiple school children to be scattered in multiple cars, with unknown drivers, on numerous roadways and subjected to various weather elements while traveling to the same school-related event.

Other pertinent transportation safety policies enacted by the defendant Board serve to bolster the notion that the Board did in fact foresee the risk of individual children securing transportation for themselves to school events. For instance, as previously discussed, the Board clearly mandated that any overnight trip involving students must receive approval from the Putnam County Board of Education and the Superintendent of Schools. *Board Policy Manual*, § T.3.4. Further, Board Policy mandated that the Putnam County Board of Education must approve any student trip which crossed the Putnam County line, no less than two (2) weeks prior to the proposed trip. *Id.* Other Board transportation policies ban students from driving either their own automobile or someone else's automobile to an extracurricular activity and require that overnight trips receive approval of the Superintendent and the Board of Education. *Board Policy Manual*, § T.3.4, T.3.9. Each of these policies were ignored as Choir Director Haught admitted in his deposition that he never read the Board Policy Manual and was not even aware that these transportation policies existed at the time of Timothy's death. *Depo Haught*, 22:5.

From just a general perusal of the Putnam County Board's transportation safety policy, it is abundantly clear that the Board should have reasonably expected that school children may act foolishly in transporting themselves to school events. By adopting a transportation safety policy for students, the Board demonstrates its understanding that children who are placed in charge of their own transportation are apt to act upon their own "childish instincts and impulses" to their

own detriment. These policies completely reflect the Board's understanding that injury or death could result from private transportation to curricular or extracurricular events. With these facts in mind, this Court is urged to find that a jury should determine whether it was reasonably foreseeable, under the circumstances, that a child could be injured or killed if the Board's transportation policies are ignored and children are left to their own device when traveling to a mandated, school activity involving more than ten (10) students.

B. Causation

The Putnam County Circuit Court erroneously concluded that the actions of Larry Jackson and Brian Ramsburg were superseding/intervening acts which broke any chain of causation between the Board's failure to provide transportation for the WHS Show Choir participants and the death of Timothy Jackson. Larry Jackson is the father of Timothy Jackson, whom the Putnam County Circuit Court believed was negligent by allowing Timothy to ride with a fellow student to and from the retreat. And, Brian Ramsburg was a WHS student that was the driver of the car in which Timothy Jackson was riding as a passenger during their return from the Sissionville, WV, retreat to Winfield, WV. The Court below held that Ramsburg's negligent operation of his vehicle was a subsequent/intervening act which also broke the chain of causation, not only with Larry Jackson's negligence, but also from the negligence of the Board for its failure to provide transportation to Timothy Jackson.

The Circuit Court ignored the entire body of law that pertains to questions of superseding/intervening acts when it granted summary judgement to the Appellee on this issue. Through a myriad of past decisions, this Court has held that all questions pertaining to negligence, due care, proximate cause and concurrent negligence, present issues of fact for

jury determination when the evidence pertaining to such issues is conflicting or where the facts, even though undisputed, are such that reasonable men may draw different conclusions from them. *Ratlief*, 280 S.E.2d at 585.

In order to relieve a person charged with the negligent injury of another, through the defense of intervening cause, there must be a negligent act, or omission, which constitutes, a new effective cause and operates independently of any other act, **making it and it only, the proximate cause of the injury**. *Syllabus Point 1 of Perry v. Melton*, 171 W.Va 397, 299 S.E.2d 8 (1982). Further, this Court has held that a tortfeasor whose negligence is a substantial factor in bringing about injuries is not relieved from liability by the intervening acts of third persons if those acts were reasonably foreseeable by the original tortfeasor at the time of his negligent conduct. *Harbaugh v. Coffinbarger*, 209 W.Va. 60, 543 S.E.2d 341, 345 (2000).

Cases applying these points of law in analogous circumstances demonstrate the Court's strong preference to allow juries, rather than Circuit Court judges, to resolve issues of proximate cause and intervening cause. To illustrate, in the case of *Wehner*, defendant Brett Weinstein, a member of a West Virginia University fraternity, was parked at the fraternity house and was attempting to leave in his car, but was blocked by a pizza delivery vehicle which was owned by Mario's Pizza, but driven by David Turner, an employee. *Wehner* 444 S.E.2d at 31. In an effort to move the delivery car, Weinstein, assisted by his friend, Matthew Kiser, opened the car's door, released the hand brake, and placed the gear shift in neutral. *Id.* One person was killed by the runaway vehicle and two others were injured. *Id.* At trial, each of the defending parties, including Mario's, was found liable to various degrees. *Id.*

On appeal, defendant Mario's Pizza sought to escape liability as it argued that the actions

of Weinstein and Kiser, by releasing the hand brake, placing the car in neutral, and attempting to move it were independent or intervening causes of the accident. *Id.* at 32. The *Wehner Court* disagreed with Mario's and held that the pizza maker was unable to show that the acts of Weinstein and Kiser operated independently of any other fact. *Id.* at 33. In support of its holding, the Court cited *Syllabus Point 2 of Peak v. Ratliff*, which states that liability may attach so long as the negligence of a tortfeasor contributes in any degree to the injury. *Syl. Pt 2 Peak v. Patliff*, 185 W.Va. 548, 408 S.E.2d 300, 300 (1991).

In the case at hand, the negligence of the Board is even more substantial than the negligence of Mario's Pizza in *Wehner*. Like Mario's, the Board cannot show that its negligent acts operate independent of any other fact in this case. If the Board had fulfilled its duty, Timothy Jackson would not have been forced to seek transportation from anyone. The question of intervening cause does not even enter into the analysis of this case, if WHS had provided bus transportation to the forty (40) Show Choir members who attended the retreat. And, had WHS followed the *Board Policy Manual* which prohibited students from driving to extracurricular activities the issue of Brian Ramsburg's negligent vehicle operation becomes moot. Quite simply, if the Board transportation regulations had been followed, there would be no reason to examine the action of Brian Ramsburg or Larry Jackson.

The chain of events which lead to Timothy Jackson's death was placed in motion by Choir Director Haught, who testified in his deposition that he did not read nor implement the Putnam County Board of Education's transportation policies that were in force at the time of Timothy's death. *Depo. Haught 22:5*. In fact, Haught testified that "we weren't responsible for how they [the students] got there." (Parenthetical Added) *Id at 16:5*. Had WHS and Haught

complied with *Rule T.3.4* of the *Board Policy Manual*, and transported the approximately forty (40) students to the out-of-county, weekend trip, by bus, Larry Jackson would not have been faced with the decision to allow his son to ride with Brian Ramsburg. Choir Director Haught testified in his deposition the only paper he ever received from Timothy, which informed him of how the student was getting to the retreat, was a "yellow Post It note" that informed him that Timothy's father would take him to the retreat. *Id.* at 16:19. Haught never objected to the "Post It note."

In regard to the Court's holding as to Mr. Ramsburg's negligence and his culpability as an intervening cause of Timothy's death, there is no doubt that if WHS had complied with *Board Policy Manual Rule T.3.9*, which forbade students from driving their own automobiles or automobiles owned by another person, Brian Ramsburg would not have been allowed to drive himself to the retreat and would not have had the opportunity to transport fellow student, Timothy Jackson.

Choir Director Haught testified that he was informed, through a note from Brian Ramsburg's parents that Brian would be driving himself to the retreat. *Id.* at 17: 4. Despite Board regulations banning this method of transportation for students traveling to school-sponsored events, Haught failed to stop Ramsburg from driving. For any high school instructor with the experience level of Jeffrey Haught, it is perfectly foreseeable that by allowing the youthful Mr. Ramsburg to drive himself to the retreat that he could be injured or he could injure someone else. It is also perfectly foreseeable that other students, like Timothy Jackson, could potentially end up in the car of another student during the weekend retreat. After all, as this Court reasoned in the *Moore* decision, school children are unpredictable. One must reason that

children will not always act responsibly.

It is likely that when the Board drafted *Rule T.3.4*, it was concerned that trips involving more than ten (10) children would not only place large numbers of children on the road at one time in separate vehicles, which is nearly impossible to chaperone, but it would also make it difficult for instructors and chaperones to insure that students were not driving themselves or others. Shockingly, as the primary school instructor in charge of this retreat, Haught testified that he had no idea how or when Timothy Jackson and Brian Ramsburg arrived at the retreat, or how or when they left. *Depo. Haught*, 17:19 - 19:19. By failing to ban Mr. Ramsburg from driving his car and by failing to provide required bus transportation to this retreat, Jeffrey Haught opened the door to potential injury or death to a student who should not have been allowed to drive to this retreat by his WHS teacher and Choir Director.

Jeffrey Haught's failure to requisition bus transportation for the students traveling to the Show Choir retreat is an express violation of Board Policy and was a substantial contributing factor to Timothy Jackson's death. Further, by allowing Brian Ramsburg to transport himself to the retreat as a driver of a vehicle, Haught and WHS blatantly violated Board Policy. Both of these acts by Jeffrey Haught, in his role as the WHS Choir Director, were substantial factors in bringing about the death of Timothy Jackson. And, the injuries that resulted to Timothy Jackson were reasonably foreseeable at the time of WHS's negligence. Looked at in another way, it could be said that "but for" the negligence of Jeffrey Haught and WHS, Larry Jackson would not have been asked to find transportation for his child to the retreat and Brian Ramsburg would not have been allowed to drive to the retreat.

In closing, by following the *Perry* decision, there is no doubt that the Board should not be

relieved of negligence through the defense of intervening cause as the acts of Larry Jackson and Brian Ramsburg are not new and effective causes which operate independently of the Board's own negligence. Quite to the contrary, the Board had a mandate to transport the children by bus, but failed to do so. If the children had been transported by bus, Timothy would be alive today and Larry Jackson and Brian Ramsburg would not have been given the opportunity to make any decisions or act in any way regarding Timothy Jackson's retreat transportation. The *Peak* case informs us that negligence that contributes in any degree to the injury may attach liability to the defendant and render that defendant incapable of raising the defense of "intervening cause." In the end, because questions pertaining to proximate cause exist which could lead reasonable men to draw different conclusions, this Court should reverse the lower Court's ruling as to Larry Jackson and Brian Ramsburg's negligence and remand this action to the Circuit Court for a jury trial.

IV. THE "HEALTH AND INSURANCE INFORMATION" FORM IS NOT A VALID EXPRESS AGREEMENT TO ASSUME THE RISK BECAUSE THE AGREEMENT, WHICH WAS PREPARED BY THE DEFENDANT, WAS DRAFTED IN A CONFUSING MANNER, WAS NOT UNDERSTOOD BY THE PLAINTIFF, AND THE TERMS OF THE FORM WERE NEVER INTENDED BY BOTH PARTIES TO APPLY TO THE DEFENDANT'S PARTICULAR CONDUCT WHICH CAUSED THE HARM IN THIS CASE.

The *Health and Insurance Information* form, which was drafted by Jeffrey Haight and WHS, does not operate as a valid release or express agreement to assume the risk of liability by Larry or Susan Jackson. When closely examined, this document, which the Appellee purports to be a release of all claims, attempts to do four things all under the umbrella of a single page, in a single paragraph, with a single signature. The four tasks that this single form attempts to accomplish within the context of eight sentences are as follows:

1. Gather Health and Insurance Information from the Child's Legal Guardian, which included, but was not limited to, medical problems, allergies, medications taken by the child, special dietary needs, and emergency contact and insurance information. The form is even entitled **HEALTH AND INSURANCE INFORMATION**. There are no other titles or headings on the form.
2. It authorizes Mr. Jeff Haught or other chaperones to give permission for medical treatment on behalf of the student in the absence of the parent or guardian.
3. It requires the parent to attest that the health and insurance information provided for the child is "correct and current" to the date listed on the form.
4. It asks the parent to "release and agree to indemnify" Mr. Jeffrey A. Haught, teacher; Winfield High School and its employees; the Putnam County Board of Education and its employees and all adult chaperones from any and all claims or responsibilities of the child while rehearsing, performing, or traveling with the Winfield High School Show Choir, General Admission.

See *Health and Insurance Information* form, Attached as Exhibit 11.

When one reviews the *Health and Insurance Information* form, along with the law of this state regarding anticipatory releases and express assumption of risk agreements that is found in *Murphy v. North American River Runners*, 186 W.Va. 310, 412 S.E.2d 504 (1991), it is clear that this form does not operate as a valid release of claims.

In *Murphy*, this Court held that in order for an express agreement to assume the risk to be valid and effective, it must appear that the plaintiff has given his assent to the terms of the agreement. *Id* at 316. Particularly, where the agreement is prepared by the defendant, it must appear that the terms were in fact brought home to, and understood by the plaintiff, before it may be found that the plaintiff has agreed to them. Restatement (Second) Torts § 496B comment (1963, 1964)." *Id*. Additionally, in order for an express agreement to assume the risk to be

effective, it must also appear that its terms were intended by both parties to apply to the particular conduct of the defendant which has caused the harm. *Id.* To determine whether there was such intent, when the agreement is prepared by the defendant, its terms will be construed strictly against the defendant. *Id.* These rules of anticipatory release construction are specifically related to the general rule that “[a] release ordinarily covers only such matters as may fairly be said to have been within the contemplation of the parties at the time of its execution.” *Id.*

The Circuit Court failed to properly apply the requirements of *Murphy* to the facts of this case when it held that the *Health and Insurance Information* form, signed by Larry Jackson at the beginning of the school year, was a valid release of any and all negligence claims against the Board and WHS for the Show Choir retreat at Rippling Waters. *Or. Granting Defs’ Mot. S.J.* at 4. As mentioned, there are several catastrophic flaws in this form which prevent it from being legally valid, but perhaps its most significant flaw is that the form never informed Larry Jackson that Timothy Jackson had a right to be transported by either school or charter bus to the mandatory Show Choir retreat. The form was not intended to release the school from its responsibility, under *Board Policy Rule T.3.4*, to transport Timothy to the event. It does not explain to Mr. Jackson that his child was entitled to bus transportation to the retreat, but that by signing such form, that he would be waiving his child’s right to bus transportation and thereby assuming the risk for his child’s private transportation to and from the event.

The *Murphy* decision requires that by signing the form, both parties must have appeared to have intended that the release apply to the “particular conduct of the defendant which caused the harm.” The *Health and Insurance Information* form that is in question here, was a generic

form that was written with no specific trip in mind; there were no specific forms required for the Rippling Waters retreat. *Depo. Haught*, 14:23-15:16. This form was sent home as part of a Show Choir handbook during the “first week of school” to be signed by the parent before the parent knew of any specific Show Choir trips, locations or transportation arrangements. *Id* at 20:5.

It would be entirely impossible for a parent to knowingly and intelligently waive all of a child’s rights as to all situations, involving all people, during all trips throughout the year, prior to being informed of the specific travel destination and prior to knowing who will chaperone the event or when and by what method the child would leave and return from the trip. In asking this Court to construe the *Health and Insurance Information* form as a release, the Appellee is effectively asking this Court to overturn it’s prior requirement in *Murphy* that the release must have been intended to apply to the particular conduct of the defendant which caused the harm. The Appellant cautions the Court that this would be a dangerous precedent to set in instances like the one at hand. Such a release would be an open invitation for schools, teachers, employees and chaperones to provide little information to the parents regarding mandatory trips and would openly invite such chaperones to act negligently without consequence or duty to the student or the student’s parents for their substandard care of the child.

Secondly, the form is not clear as to what the parent or guardian is actually agreeing to or for what he is granting his consent. As highlighted above, the form is entitled [in bold] “**Health and Insurance Information.**” See Exhibit 11. It requests that the parent “attest” that a long list of health and insurance information that is provided by the parent about the child is “correct and current to the date listed” on the sheet. *Id*. It is assumed that this attestation as to the truth and currency of this information was to come in the form of a signature that was required at the

bottom of the page. If one were to sign this document, it is likely, that person is simply attesting to the truth and currency of the information provided on the page.

However, in a blatant attempt to 'muddy the water' as to what the signee is actually signing, the Appellee added an authorization clause within the same eight sentence paragraph.

Health and Insurance Information form. The authorization allows "Mr. Haught or the other chaperones to give permission for medical treatment" for the signee's child should an emergency arise during a trip. Arguably, anyone who signs this form would have provided their signature based upon the idea that they were simply allowing Mr. Haught or the chaperones to give permission for medical treatment during a medical emergency.

Although, most troubling is the Appellee's placement of a release and indemnification clause within the same paragraph that also purports to be an authorization for medical treatment and an attestation as to the truth and currency of other information requested about the child's health on the same page. *Id.* So, by signing the *Health and Insurance Information* form, it is entirely possible that any signee could believe that he was merely signing a medical authorization and providing health and insurance information to the school, especially considering the misleading title of *Health and Insurance Information* that was placed prominently atop the form. *Id.*

Lastly, even if one were to construe the *Health and Insurance Information* form as a valid release, the form as applied to this situation, would only release the school and chaperones for claims and responsibilities of the child while "traveling with the Winfield High School Show Choir, general admission." *Id.* Timothy Jackson was never given the opportunity to actually travel with the Show Choir. Director Haught made it abundantly clear in his deposition that he

did not believe the school was responsible for providing transportation to the students despite the Board Policy mandates of Rule T.3.4. *Depo. Haught*, 16:5. So, because the school did not provide transportation to the students, each of the approximate forty (40) students had to travel in separate vehicles and never traveled "with" each other. Therefore, this form, even if it is construed as a release of liability, does not include those instances, like the one at hand, where students were transported privately and individually. Instead, it is clear that it would have only covered instances where the group would have traveled together by bus or other mode of school sponsored transportation. Even then, the release suffers from the other fatal flaws discussed above.

In closing, when a release is prepared by the defendant, its terms will be construed strictly against the defendant. Here, construing the terms of this release strictly against the drafting Appellee/Defendant, the Appellant requests that this Court find the release invalid as a matter of law, instruct the Putnam County Circuit Court that it should not be considered as a release of liability in further proceedings and remand this case to that Circuit Court for a jury trial on the merits of this claim.

CONCLUSION

In conclusion, *West Virginia Code*, §18-5-13(6)(a), empowers local school boards to establish its own regulations regarding the transportation of school children to and from board approved curricular and extracurricular activities. The Board established such rules and regulations regarding the transportation of students to those events. Through its enactment of transportation rules and regulations, the Board created a duty or a 'standard of care,' for its schools to follow in the transportation of school children. Each public school within Putnam

County must follow the Board's directives, or face the prospect of claims of negligence when it fails to do so. Because the question of whether a legal duty exists must be determined by a Court rather than by a jury, the Appellant respectfully requests that this Court find that such duty did, indeed, exist.

From a factual perspective, WHS, by and through its Choir Director, Jeffrey Haught, breached five specific Board transportation regulations which proximately caused Timothy Jackson's death. As noted previously, the five breaches are as follows:

- (a) Board policy mandated that any trip in which ten (10) or more students are involved shall utilize school or charter bus transportation. WHS failed to requisition either school or charter buses for the Show Choir Retreat.
- (b) Board policy mandated that "under no circumstances" may a student or anyone under twenty-one (21) years old be allowed to serve as a driver for a student trip unless they are a regular or substitute bus operator employed by the Board of Education. WHS allowed Brian Ramsburg, who was a student enrolled at Winfiled High School and under the age of twenty-one (21), to serve as a driver to and from the retreat.
- (c) Board policy mandated that Putnam County Board of Education approval was necessary for any student trip which crossed the Putnam County line. WHS failed to seek Board approval for the Show Choir retreat.
- (d) Board policy mandated that any overnight trip involving students must receive approval from the Putnam County Board of Education and the Superintendent of Schools. WHS failed to seek the approval of either of these entities prior to the Show Choir retreat.
- (e) Board policy mandated that students were not permitted to drive their own automobiles to transport themselves and others to an extracurricular event. WHS allowed Brian Ramsburg to transport himself to the Show Choir retreat.

The Appellant alleges that each of these breaches by the Appellee proximately caused the death of Timothy Jackson. At a minimum, it should be determined that there are genuine issues

of fact that should be tried and decided by a jury. Therefore, Summary Judgment should not be issued based solely upon the breaches alleged, and the facts that are presently known.

Next, the damages in this case should be decided according to the wrongful death statute of this state. The Circuit Court erred by holding that damages flowing from the death of Timothy Jackson, and the question of whether the Board had an obligation to provide transportation for the students to and from the Show Choir Retreat, could only be enforced by way of a *writ of mandamus*. A *writ of mandamus* is not an adequate remedy at law for the circumstances of this case. Once the Board failed to perform its required legal duty, and such failure resulted in death to Timothy Jackson, then the damages should certainly be determined by this state's wrongful death statute. The Appellant respectfully requests that this Court hold that the proper measure of damages in this case are outlined by the wrongful death statute, and that a *writ of mandamus* is an inadequate remedy at law.

Additionally, the actions of Larry Jackson and Brian Ramsburg do not rise to the level of intervening causes which operate independently of the Board's own negligence. The Appellant asserts that the question of intervening cause does not even enter into the analysis of this case if WHS had provided bus transportation to the approximately forty (40) Show Choir members who attended the retreat. In other words, if WHS had placed Timothy Jackson on a bus bound for Rippling Waters, Timothy would not have been faced with the decision to ride with Brian Ramsburg, or any other student driver on the date of his death. There is no doubt that the Board's negligence was foreseeable and was a "substantial factor" in bringing about Timothy Jackson's death.

Alternatively, as held in *Ratlief*, any questions regarding a person's negligence and

whether that negligence constitutes an intervening cause is a question for the jury. When evidence is conflicting, or the facts are such that reasonable men may draw different conclusions, such conflict is a question for the jury. Therefore, an issuance of summary judgment based upon the question of intervening or superseding cause is entirely inappropriate and the Circuit Court should be so instructed if remand is granted in this case.

Finally, the *Health and Insurance Information* form signed by Larry Jackson, prior to Timothy's departure to the Show Choir retreat, was not a valid release of any and all negligence by the Board of Education. The document referenced as a "release" in the Circuit Court's Order is a *Health and Insurance Information* form. Larry Jackson did not give his assent to the terms of the agreement for the purposes alleged by the Appellee. Larry Jackson did not intend to release the Board from its duty to transport Timothy Jackson to the mandatory Show Choir event. In fact, Larry Jackson was never informed that Timothy had a right to be transported by school or charter buses to the mandatory event. The *Murphy* case tell us very clearly that for a release to be effective, it must appear that its terms were intended by both parties to apply to the particular conduct of the defendant that has caused the harm. Here, the facts which give rise to the Appellee's breach were never discussed within the *Health and Insurance Information* form, and therefore never released by the Appellant.

Moreover, the alleged release states that the undersigned agrees to release and indemnify the named individuals from any and all claims or responsibilities while "my child" is "traveling with" the WHS Show Choir. Sadly, Timothy Jackson was not given the opportunity to travel with the WHS Show Choir. Had WHS not violated Board policy by presenting the parent with an alleged "release," and instead offered transportation as outlined in the *Board Policy Manual*,

Timothy Jackson would be alive today. Therefore, the Appellant asks this Court to find the release invalid as a matter of law.

RELIEF REQUESTED

For the above reasons and for all others on the face of the record, Appellant/Plaintiff, Susan M. Jackson, moves this Honorable Court to reverse the Circuit Court's decision and finding of Summary Judgment against her and remand this case to such Court with instructions to proceed with a new trial schedule in accordance with this Court's instructions.



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

SUSAN M. JACKSON, Administratrix
of the Estate of Timothy J. Jackson,

Appellant/Plaintiff,

v.

Case No. 33038

THE PUTNAM COUNTY BOARD
OF EDUCATION,

Appellee/Defendant.

CERTIFICATE OF SERVICE

I, Bernard E. Layne, III, do hereby certify that **APPELLANT'S BRIEF** was served upon
counsel of record for Appellee by depositing such in the U.S. Mail, first class, this 5th day of
April, 2006, as follows:

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